



Tax Alert

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Let's talk

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Dutch “Most Favoured Nation Clause”: South African Tax Court finds in favour of taxpayer

In brief

The “most favoured nation clause” (or “MFN clause”) in the double taxation agreement between South Africa and the Netherlands (“the SA-Netherlands DTA”) has been the subject of a number of our Tax Alerts.

In our most recent Alert on the issue (dated 21 January 2019) we drew the attention of readers to a decision of the Dutch Supreme Court, the highest court of appeal in the Netherlands, that the MFN clause applies to effectively exempt from Dutch dividends tax dividends paid by a Dutch resident company to a South African resident.

On 12 June 2019, the South African Tax Court issued a judgment dealing with the issue in respect of South African dividends tax on dividends paid by a South African resident company to a Dutch resident. As could reasonably have been expected, the decision of the Tax Court is that the MFN clause in the SA-Netherlands DTA also applies to exempt from South African dividends tax dividends paid by a South African resident company to a Dutch resident.

In detail

Background

For a detailed discussion of the mechanics of the MFN clause and the arguments in favour of (and against) the exemption, readers are referred to our previous Tax Alerts (dated 4 September 2017 and 21 January 2019).

The matter of *ABC (Pty) Ltd v CSARS* was heard in the Cape Town Tax Court in March 2019. The taxpayer, a South African tax

resident, had paid dividends to its shareholder company, a tax resident of the Netherlands. Before paying these dividends, the Dutch shareholder had, in terms of the South African Income Tax Act, 1962 (Act No. 58 of 1962), provided the taxpayer with a declaration to the effect that the dividends were (in terms of Article 10(2) of the SA-Netherlands DTA) subject to South African dividends tax at a rate of 5%.

Acting in accordance with the declaration provided to it by its shareholder, the taxpayer withheld dividends tax at the rate of 5%, and paid the dividends tax so withheld to SARS.

Subsequent to the payment of the dividends, the taxpayer and its Dutch shareholder took the view that the declaration was incorrect on the basis that the dividends were, in terms of Article 10(10) of the SA-Netherlands DTA (i.e. the MFN clause), in fact exempt from South African dividends tax.

Following submission of the revised declaration to the taxpayer by its shareholder, the taxpayer, arguing that the MFN clause effectively exempted the dividends from South African dividends tax, sought a refund of the dividends tax it had paid from the Commissioner.

The Commissioner refused the request for the refund, and the matter ultimately came before the Tax Court in Cape Town.

The decision of the South African Tax Court

In a nutshell, the Tax Court found in favour of the taxpayer, holding that the MFN clause did indeed apply to exempt from South African dividends tax dividends paid by the taxpayer to its Dutch shareholder.

In General

This decision of the Tax Court has, to some extent, reduced the uncertainty relating to the applicability of the MFN clause to South African dividends tax.

We are now still in the 21 business day period in which SARS must consider whether it is going to appeal the decision to the High Court. It should also be noted that the status of the Tax Court (as regards the strength of its decisions) is similar to that of the Magistrate's Court: decisions of the Tax Court do not constitute legal precedent that is binding on the Commissioner or itself in subsequent matters.

Further developments are therefore eagerly awaited. As the situation currently stands, however, South African residents who have paid dividends to Dutch shareholders may be entitled to a refund of any dividends tax they have paid, and may not be required to withhold dividends tax from such dividends (provided, of course, that all necessary treaty and local legislative requirements have been met).

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